United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

76-1570
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P/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

-against-

HENRY GOMEZ LONDONO,

Defendant-Appellee.

Docket No. 76-1570

PETITION FOR REHEARING OR REHEARING EN BANC

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On April 18, 1977, a panel of this Court* reversed an order of the United States District Court for the Eastern District of New York (Dooling, J.), which suppressed evidence seized pursuant to a warrant. In so doing, the Court has announced a novel, if not strange rule of law which is totally unsupported by authority from any other Circuit, any decision of the United States Supreme Court, and which flatly contradicts earlier decisions by this very Court.

Announcement of this departure from established legal pathways cannot help generating confusion and uncertainty in this significant area of law. Indeed, the Court's opinion is

* The panel consisted of Circuit Judges Lumbard and Oakes, and Hon. Frederick van Pelt Bryan, U.S.D.J., sitting by designation.

itself shrouded in mystery. For this reason, appellee Henry Gomez Londono respectfully prays that the Court reconsider its decision, or, alternatively, rehear the case en banc.

The facts have been amply discussed in the briefs and the panel opinion, and, indeed, were never in dispute. The principal issue in this case was whether the facts submitted to the Magistrate justified issuance of a search warrant where those facts affirmatively established, as a matter of law, that no crime at all had been committed. The District Court held (properly, we submit) that, under the circumstances, the "nature of law is such" that the warrant application is, perforce, insufficient in law.

This Court disagreed, holding that where a magistrate's mistake of law is made in good faith, the warrant issued survives subsequent attack. The Court has thus announced a brand new and unprecedented principle, which, we submit, wreaks havoc with well-established doctrines. Indeed, apparently aware of the novelty of its holding, the panel no sooner announced its result than it added the following disclaiming, albeit cryptic, footnote:

> We do not mean to suggest a search warrant can be upheld simply on the basis of a magistrate's good faith belief that a crime has been alleged

> in the affidavit, regardless whether in fact any crime has been alleged. We hold only that under the unusual circumstances presented by this case, the magistrate was warranted in finding there was probable cause to believe a violation of law had occurred.
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> United States v. Gomez Londono, ____ F.2d ____, Docket No. 76-1570 (2d Cir. Apr. 18, 1977) (slip op. at 2971 n. 9.)

If the Court did "not mean to suggest" that a search warrant can be upheld simply on the basis of a magistrate's good-faith belief, then it is hard to see what the Court, in fact, did mean to suggest. Mystified as we are by this holding and footnote, however, we assume the Court meant what it said; namely, it "made no difference" that the District Court later held that the facts before the magistrate affirmatively established, as a matter of law, that no crime at all had been committed by appellee. Id.

It is simply impossible to reconcile this rationale with the law previously established by this Court. It has never before been held that a magistrate's error of law, irrespective of its "reasonableness," and however made in

good faith, somehow "saves" the warrant.*

In United States v. Karathanos, 531 F.2d 26 (2d Cir.) cert. denied, _____ U.S. _____, 96 S. Ct. 3221 (1976), for instance, this Court found, in applying well-established legal principles, that the magistrate's error in issuing a warrant, where the facts before him failed to satisfy the legal criterion for "trustworthiness of the information" set forth in Aguilar v. Texas, supra, and Spinelli v. United States, 393 U.S. 410 (1969), vitiated the warrant and required suppression of the evidence seized. In Karathanos, no one supposed that the magistrate had acted in other than good faith. Indeed, in Karathanos, as was the case here, and as is the case every time law enforcement officers seek a search warrant, no one was before the magistrate to articulate the defendant's cause.

* The panel, of course, correctly noted that a magistrate's determination of probable cause, based upon a detailed factual affidavit, is generally to be accorded deference by any reviewing court. Aguilar v. Texas, 378 U.S. 108, 111 (1964); United States v. Canestri, 518 F.2d 269, 273 (2d Cir. 1975); United States v. Ramirez, 279 F.2d, 712, 716 (2d Cir.) cert. denied, 364 U.S. 850 (1960). The panel also correctly noted what was also pointed out by the District Court: no one was before the magistrate to suggest to him the legal infirmities inherent in the warrant application. However, the deference to be accorded a magistrate's factual determination of probable cause arises from the very definition of probable cause -- in many instances, the magistrate's conclusion in this regard is a matter about which reasonable men may reasonably disagree. Where, however, the magistrate's error is one of law -- where, as here, the error is a failure to apprehend that the very facts set forth in the affidavit affirmatively established that no crime at all has been committed -- it is just because of the ex parte nature of a search warrant application that the magistrate's determination of law is not to be accorded the same measure of deference due his view of the facts.

The fact that the magistrate in Karathanos acted in good faith, albeit erroneously, did not there save the warrant. It should not have done so here.

Similarly, in United States v. Brouilette, 478 F.2d 1171 (5th Cir. 1973); United States v. Birrell, 242 F. Supp., 735, 738 (S.D.N.Y. 1965); Tripodi v. Morgenthau, 213 F. Supp., 735, 738 (S.D.N.Y. 1962) warrants issued by United States magistrates were held unlawful where the facts before the magistrate established probable cause to believe that only a state, rather than federal, crime had been committed. In each case, no issue was raised as to the magistrate's good faith belief that the facts before him were sufficient to persuade him that the occasion was a proper one on which to issue a federal search warrant. Nevertheless, this fact was irrelevant, as it should have been, to the subsequent determinations of United States District Judges whose responsibility it was to pass upon the legal questions at issue.

Similarly, in the instant case, the magistrate doubtlessly believed that Gomez Londono had "gone far enough", as this Court put it, to justify the belief that he had violated the law. However, the magistrate was in error in this conclusion, as Judge Dooling has held, and as the Government here

concedes.*

Indeed, to analyze the instant case in terms of probable cause is, we submit, to miss the issue. As Judge Dooling correctly perceived, the dispute in the instant case, revolves not around any factual insufficiency in the affidavit, but rather about the legal problems suggested by the very completeness of the affidavit.

Thus, the issue here was whether a warrant could issue under circumstances where the facts before the magistrate, far from establishing probable cause, affirmatively showed that no violation of law had occurred. In holding that a warrant may nevertheless issue where the magistrate is incorrect as a matter of law in concluding that a crime had been committed, the Court strikes off on previously uncharted legal ground and, as a result, raises serious questions as to whether any search warrant issued by a magistrate in the good faith belief that the application for the warrant is sufficient can ever be successfully attacked thereafter.

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* The analytical approach undertaken by the Court in its opinion was undertaken sua sponte. While the Government argued the issue of probable cause before the District Court, it abandoned that argument in this Court, apparently in the belief that its concessions regarding the sufficiency of Counts 1 and 2 of the indictments precluded any realistic chance of success for that argument.

Even on the panel's analysis, however, the warrant could not possibly be sustained without the additional finding that Gomez Londono's statements, suppressed by Judge Dooling, were properly before the magistrate for his consideration. There is absolutely no dispute that without those statements, the application provided the magistrate with an insufficient factual predicate upon which to issue a warrant. Thus, we must consider the suppression of Gomez Londono's statements.

The panel reversed the District Court's suppression of Gomez Londono's statements, rejecting Judge Dooling's determination that the circumstances surrounding the interrogation violated due process. The Court wrote:

> Although, as Judge Dooling found, the better practice here might have been for the Customs Agents to have advised appellee that if he filled out the appropriate form he would be free to depart the country with as much money as he desired (unless, of course, there was probable cause to hold him for a violation of the narcotics laws or detain him as a material witness), we cannot say that customs agents have a constitutional obligation to advise those who are suspected of being lawbreakers that it is in their best interests to comply with the law.
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> United States v. Gomez Londono, supra, slip op. at 2972.

But this analysis passes far too lightly over a vexing and troublesome question. It is not as if the Customs agents in the present case were acting in a purely investigative capacity, seeking to ferret out facts about a particular crime or offense. The Government conceded below and has never disputed that, up until the time of his airport interrogation Gomez Londono had not violated any law, and that what violations of law occurred, if any, came only as a result of his response to official questioning.

Thus, the issue here is not whether "customs agents have a constitutional obligation to advise those who are suspected of being lawbreakers that it is in their best interest to comply with the law." The issue is whether law enforcement officers are properly in the business of garnering transgressions of law and bootstrapping non-criminal conduct into possible felonies by asking appropriately leading questions without informing an unsuspecting defendant that the wrong answers will result in arrest, and that the right answers will result in no untoward consequences. Surely Congress did not intend the Bank Secrecy Act as a trap for the unwary. Compare, United States v. San Juan, 545 F.2d 314 (2d Cir. 1976).

Moreover, what happened here is all the more compelling in view of the fact that, at the time of Gomez Londono's

interrogation, no public information of any kind was either disseminated or posted at Kennedy Airport to advise international travelers of their obligations to file reports required by the Act. This must be coupled with the fact that, as the Court may take judicial notice, it is unlawful to remove United States currency from Gomez Londono's home country, Colombia, without governmental permission. It cannot be said, therefore, that the agent's questions of Gomez Londono made clear to him that he had not yet violated any law but might do so if he answered falsely. Rather, the situation may have appeared to him as one in which he had already violated the law and was now being questioned.

Moreover, the Court's opinion in this regard totally ignores earlier authority holding that Customs agents, under these circumstances, have a minimal, threshhold obligation to comply with the regulations issued by the Secretary of the Treasury for their guidance, and that their failure to do so renders their actions null, void, and of no effect. In United States v. Jones, 368 F.2d 795 (2d Cir. 1966), this Court so held. In Jones, the defendant, who had previously been convicted of a narcotics offense, had left the United States without registering as then required by law.

The statute required that when any person who was addicted to the use of narcotics, or who had previously been convicted of a narcotics offense, left the United States, he was to report that fact on a registration form, a copy of which remained in the custody of the Customs Service, and the original of which the addict/former violater was to surrender upon his return. Regulations promulgated pursuant to the authority of the statute provided that if a person failed to register upon his departure from the United States, he was to register on appropriate forms immediately upon re-entering the United States.

Jones had left the United States for Canada without filing the appropriate form. Canadian officials deported him, and, immediately upon his arrival in the United States, Jones was accosted by customs agents. After determining that Jones had a previous narcotics conviction, a fact which Jones readily admitted, the agents asked if he had the appropriate certificate on his person. Jones replied that he did not, but expressed the view that he was not required to register because his narcotics conviction was more than ten years old. After the agents informed Jones that there was no such dispensation in the law, after the agents again warned Jones that he was required to register, and after Jones repeated, for the

second time, his opinion that he was not required to register, the agents arrested him.

Thus, in Jones, as in the present case, the defendant was arrested without being afforded an opportunity to conform his conduct to the law. There, as here, customs agents charged with the execution of a law requiring the filing of documents failed to provide the defendant with the appropriate documents, but instead arrested him. There, as here, the relevant regulation plainly contemplated that the appropriate form be given to those as to whom the obligation to file the form is apparent to customs agents. Indeed, construing the regulation applicable in Jones in precisely this fashion, this Court reversed his conviction and directed the entry of a judgment of acquittal in his behalf. The Court held:

> Our decision [to reverse] rests on the principle that because the government has failed to follow its own regulation, promulgated in the proper exercise of the Secretary of the Treasury's discretion, its action can have no effect. In other words, having failed to supply Jones with [the appropriate] form ... and to give him the opportunity to register provided for in the regulation, his arrest and indictment are invalid. There is no novelty in holding that where an official is given discretionary power by statute, promulgates regulations as to how the power is to be exercised and then fails to follow his own regulations, the action is of no effect.
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> United States v. Jones, supra, at 799 (citations omitted)

Jones, we respectfully submit, controls the instant case. But, again, beyond the failure of the agents in this case to comply with the technical amenities of the Code of Federal Regulations, lies the inherent unfairness in self-created crime -- at least under circumstances where a crime, if committed at all, is only committed by words spoken in response to official questioning. Under those circumstances, as Judge Dooling correctly saw, the Government must be prepared to show that its agents have acted with a scrupulous regard for fairness and not for the purpose of creating a crime or "making a case" where none would otherwise exist.

CONCLUSION

FOR ALL THE FOREGOING REASONS,
THE COURT SHOULD REHEAR THE CASE,
OR, ALTERNATIVELY, REHEAR IT EN BANC.

Respectively submitted,

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